

The Texas Natural Resource Conservation Commission (commission) proposes amendments to §114.314, Registration of Diesel Producers and Importers and §114.319, Affected Counties and Compliance Dates; and new §114.318, Alternative Emission Reduction Plan. The commission proposes the amendments and new section to Chapter 114, Control of Air Pollution from Motor Vehicles, and corresponding revisions to the state implementation plan (SIP) in order to control ground-level ozone in the Houston/Galveston (HGA) ozone nonattainment area as well as the other affected areas in the State of Texas.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The HGA ozone nonattainment area is classified as Severe-17 under the 1990 Amendments to the Federal Clean Air Act (FCAA) as codified in 42 United States Code (USC), §§7401 et seq., and therefore is required to attain the one-hour ozone standard of 0.12 parts per million (ppm) by November 15, 2007. In addition, 42 USC, §7502(a)(2), requires attainment as expeditiously as practicable, and §7511a(d), requires states to submit ozone attainment demonstration SIPs for severe ozone nonattainment areas, such as HGA. The HGA area, defined as Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties, has been working to develop a demonstration of attainment in accordance with 42 USC, §7410. On January 4, 1995, the state submitted the first of several Post-1996 SIP revisions for HGA.

The January 1995 SIP consisted of urban airshed model (UAM) modeling for 1988 and 1990 base case episodes, adopted rules to achieve a 9% rate-of-progress (ROP) reduction in volatile organic compounds (VOC), and a commitment schedule for the remaining ROP and attainment demonstration

elements. At the same time, but in a separate action, the State of Texas filed for the temporary nitrogen oxide (NO_x) waiver allowed by 42 USC, §7511a(f). The January 1995 SIP and the NO_x waiver were based on early base case episodes which marginally exhibited model performance in accordance with the United States Environmental Protection Agency (EPA) modeling performance standards, but which had a limited data set as inputs to the model. In 1993 and 1994, the commission was engaged in an intensive data-gathering exercise known as the Coastal Oxidant Assessment for Southeast Texas (COAST) study. The commission believed that the enhanced emissions inventory, expanded ambient air quality and meteorological monitoring, and other elements would provide a more robust data set for modeling and other analysis, which would lead to modeling results that the commission could use to better understand the nature of the ozone air quality problem in the HGA area.

Around the same time as the 1995 submittal, the EPA policy regarding SIP elements and timelines went through changes. Two national initiatives in particular resulted in changing deadlines and requirements. The first of these initiatives was a program conducted by the Ozone Transport Assessment Group (OTAG). This group grew out of a March 2, 1995 memo from Mary Nichols, former EPA Assistant Administrator for Air and Radiation, that allowed states to postpone completion of their attainment demonstrations until an assessment of the role of transported ozone and precursors had been completed for the eastern half of the nation, including the eastern portion of Texas. Texas participated in the OTAG program, and OTAG concluded that Texas does not significantly contribute to ozone exceedances in the Northeastern United States. The other major national initiative that impacted the SIP planning process was the revision to the national ambient air quality standard (NAAQS) for ozone. The EPA promulgated a final rule on July 18, 1997 changing the ozone standard to an eight-hour

standard of 0.08 ppm. In November 1996, concurrent with the proposal of the standards, the EPA proposed an interim implementation plan (IIP) that it believed would help areas like HGA transition from the old to the new standard. In an attempt to avoid a significant delay in planning activities, Texas began to follow this guidance, and readjusted its modeling and SIP development timelines accordingly. When the new standard was published, the EPA decided not to publish the IIP, and instead stated that, for areas currently exceeding the one-hour ozone standard, the one-hour standard would continue to apply until it is attained. The FCAA requires that HGA attain the standard by November 15, 2007.

The EPA issued revised draft guidance for areas such as HGA that do not attain the one-hour ozone standard. The commission adopted on May 6, 1998 and submitted to the EPA on May 19, 1998 a revision to the HGA SIP which contained the following elements in response to EPA's guidance: UAM modeling based on emissions projected from a 1993 baseline out to the 2007 attainment date; an estimate of the level of VOC and NO_x reductions necessary to achieve the one-hour ozone standard by 2007; a list of control strategies that the state could implement to attain the one-hour ozone standard; a schedule for completing the other required elements of the attainment demonstration; a revision to the Post-1996 9% ROP SIP that remedied a deficiency that the EPA believed made the previous version of that SIP unapprovable; and evidence that all measures and regulations required by Subpart 2 of Title I of the FCAA to control ozone and its precursors have been adopted and implemented, or are on an expeditious schedule to be adopted and implemented.

In November 1998, the SIP revision submitted to the EPA in May 1998 became complete by operation of law. However, the EPA stated that it could not approve the SIP until specific control strategies were modeled in the attainment demonstration. The EPA specified a submittal date of November 15, 1999 for this modeling. In a letter to the EPA dated January 5, 1999, the state committed to model two strategies showing attainment.

As the HGA modeling protocol evolved, the state eventually selected and modeled seven basic modeling scenarios. As part of this process, a group of HGA stakeholders worked closely with commission staff to identify local control strategies for the modeling. Some of the scenarios for which the stakeholders requested evaluation included options such as California-type fuel and vehicle programs as well as an acceleration simulation mode equivalent motor vehicle inspection and maintenance program. Other scenarios incorporated the estimated reductions in emissions that were expected to be achieved throughout the modeling domain as a result of the implementation of several voluntary and mandatory statewide programs adopted or planned independently of the SIP. It should be made clear that the commission did not propose that any of these strategies be included in the ultimate control strategy submitted to the EPA in 2000. The need for and effectiveness of any controls which may be implemented outside the HGA eight-county area will be evaluated on a county-by-county basis.

The SIP revision was adopted by the commission on October 27, 1999, submitted to the EPA by November 15, 1999, and contained the following elements: photochemical modeling of potential specific control strategies for attainment of the one-hour ozone standard in the HGA area by the attainment date of November 15, 2007; an analysis of seven specific modeling scenarios reflecting

various combinations of federal, state, and local controls in HGA (additional scenarios H1 and H2 build upon Scenario VI); identification of the level of reductions of VOC and NO_x necessary to attain the one-hour ozone standard by 2007; a 2007 mobile source budget for transportation conformity; identification of specific source categories which, if controlled, could result in sufficient VOC and/or NO_x reductions to attain the standard; a schedule committing to submit by April 2000 an enforceable commitment to conduct a mid-course review; and a schedule committing to submit modeling and adopted rules in support of the attainment demonstration by December 2000.

The April 19, 2000 SIP revision for HGA contained the following enforceable commitments by the state: to quantify the shortfall of NO_x reductions needed for attainment; to list and quantify potential control measures to meet the shortfall of NO_x reductions needed for attainment; to adopt the majority of the necessary rules for the HGA attainment demonstration by December 31, 2000, and to adopt the rest of the shortfall rules as expeditiously as practical, but no later than July 31, 2001; to submit a Post-1999 ROP plan by December 31, 2000; and to perform a mid-course review by May 1, 2004.

The emission reduction requirements included as part of the December 2000 SIP revision represented substantial, intensive efforts on the part of stakeholder coalitions in the HGA area. These coalitions, involving local governmental entities, elected officials, environmental groups, industry, consultants, and the public, as well as the commission and the EPA, worked diligently to identify and quantify potential control strategy measures for the HGA attainment demonstration. Local officials from the HGA area formally submitted a resolution to the commission, requesting the inclusion of many specific emission reduction strategies.

A SIP revision for HGA was adopted by the commission on December 6, 2000 and was submitted to the EPA by December 31, 2000. The December 2000 SIP revision contained rules, enforceable commitments, and photochemical modeling analyses in support of the HGA ozone attainment demonstration. In addition, this SIP contained Post-1999 ROP plans for the milestone years 2002 and 2005, and for the attainment year 2007. The SIP also contained enforceable commitments to implement further measures, if needed, in support of the HGA attainment demonstration, as well as a commitment to perform and submit a mid-course review.

In order for the HGA area to have an approvable attainment demonstration, the EPA indicated that the state must adopt those strategies modeled in the November 15, 1999 submittal and then adopt sufficient controls to close the remaining gap in NO_x emissions. The predicted emission reductions from these rules are necessary to successfully demonstrate attainment.

The HGA ozone nonattainment area will need to ultimately reduce NO_x more than 750 tons per day (tpd) to reach attainment of the one-hour standard. In addition, a VOC reduction of about 25% will have to be achieved. Adoption of the low emission diesel fuel (LED) program amendments will contribute to attainment and maintenance of the one-hour ozone standard in the HGA area.

These rules are one element of the control strategy for the HGA Attainment Demonstration SIP that reduce NO_x emissions necessary for the HGA nonattainment area to be able to demonstrate attainment with the ozone NAAQS. Additional benefits will be achieved in the Beaumont/Port Arthur (BPA) and Dallas/Fort Worth (DFW) ozone nonattainment areas, and the 95-county central and eastern Texas

region. The purpose of these proposed amendments is to modify the LED air pollution control strategy to provide additional flexibility in the rules to allow for alternative emission reduction plans; to delay the implementation date from May 1, 2002 to April 1, 2005 to allow producers sufficient time to complete refinery modifications to comply with the LED requirements; and to reduce the coverage area of the rules from statewide to those counties that have previously been included in the regional air pollution control strategy for the HGA nonattainment area.

The proposed revisions to the LED rules would no longer require LED for on-road use statewide, but would continue to require LED fuel for both on-road and non-road use in the eight-county HGA ozone nonattainment area; the four-county DFW ozone nonattainment area, which includes Collin, Dallas, Denton, and Tarrant Counties; the three-county BPA ozone nonattainment area, which includes Hardin, Jefferson, and Orange Counties; and 95 additional central and eastern Texas counties, which include Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

The LED fuel will lower the emissions of NO_x and other pollutants from fuel combustion. Because NO_x is a precursor to ground-level ozone formation, reduced emissions of NO_x will result in ground-level ozone reductions. To comply with the state LED regulations, diesel fuel producers and importers must ensure that diesel fuel distributed to the affected areas meets the specifications stated in these rules. The proposed amendments and new section delay the LED requirements from May 1, 2002 until April 1, 2005. The requirements specify that diesel fuel produced for delivery and ultimate sale to the consumer (which may ultimately be used to power a diesel fueled compression-ignition engine in a motor vehicle or in non-road equipment in the affected counties) does not exceed 500 ppm sulfur, must contain less than 10% by volume of aromatic hydrocarbons, and must have a cetane number of 48 or greater.

The LED fuel ozone control strategy requires diesel fuel content limits more restrictive than federal diesel fuel regulations. The current federal regulations governing diesel fuel quality are found in Title 40 Code of Federal Regulations (40 CFR) Part 80, Regulation of Fuels and Fuel Additives, §80.29 (Controls and Prohibitions on Diesel Fuel Quality). Section 80.29 establishes limits for fuel content for diesel fuel used in on-road motor vehicle applications. These federal regulations limit sulfur in on-road diesel fuel to 500 ppm and allow the producer to choose between meeting a minimum cetane number of 40 or a maximum aromatic hydrocarbon content of 35% by volume. The recently adopted federal regulations governing diesel fuel quality in 40 CFR §80.520 (What are the standards and dye requirements for motor vehicle diesel fuel?) will limit on-road diesel sulfur to 15 ppm beginning June 1, 2006. The state's proposed LED regulations limit both on-road and non-road diesel to 500 ppm sulfur, 10% aromatic hydrocarbons, and a 48 cetane minimum in the HGA, DFW, BPA ozone nonattainment

areas and 95 central and eastern Texas counties in 2005 and further limits on-road and non-road diesel sulfur to 15 ppm in the coverage area in 2006. However, although the EPA regulates diesel fuel content for on-road use, it does not regulate the fuel content for non-road diesel fuel. Therefore, since there is currently no federal limit on the content of non-road diesel, the state has the authority to place controls on the fuel content of non-road diesel fuel. As such, the commission is submitting, as part of the SIP, concurrent with this proposed rulemaking, a request for a waiver in accordance with the 42 USC, §7545(C)(4)(c), for the on-road portion of these rules. The commission does not believe that a waiver is needed for the non-road portion of these rules.

Modeling performed for the commission assessing the benefits of this NO_x emission reduction strategy demonstrated that significant emission reductions could be achieved from using a low aromatic hydrocarbon/high cetane diesel fuel as specified by the commission's LED fuel requirements. By the year 2007, the proposed LED fuel program will reduce NO_x emissions from on-road vehicles and non-road equipment in the regional coverage area by 16.32 tpd, of which 6.67 tpd of reductions will be achieved in the HGA ozone nonattainment area. The commission anticipates production cost will increase from \$.04 to \$.08 per gallon of diesel fuel to comply with rules.

The commission developed this NO_x emission control strategy to cover the eight counties contained in the HGA ozone nonattainment area. The coverage area also includes the four DFW ozone nonattainment counties, the three BPA ozone nonattainment counties, as well as 95 central and eastern Texas counties for both on-road and non-road diesel fuel use. The involvement of the regional area counties as part of the NO_x emission control strategy is necessary for the HGA and DFW areas to

demonstrate attainment of the ozone NAAQS. The proposed amendments and new section are intended to help bring the ozone nonattainment areas into compliance and to help keep attainment and near nonattainment areas from going into nonattainment by ensuring the ability of the fuel industry to comply with the LED program.

SECTION BY SECTION DISCUSSION

The proposed amendments to §114.314 revise the dates by which producers and importers are required to register from December 1, 2001, or after May 31, 2002 for those entities that begin to produce or import LED after that date, to December 1, 2004 and April 30, 2005 in order to reflect the proposed changes to the implementation dates in §114.319.

The proposed new §114.318 establishes an alternative method of compliance with the requirements of Chapter 114, Division 2, for producers that submit an alternative emission reduction plan by January 2003 which is approved by the executive director and the EPA no later than May 2003. The emission reduction plan must demonstrate the market share the producer supplies, demonstrate the reductions associated with compliance with this division attributable to the market share, specify a substitute fuel strategy that will achieve equivalent reductions, and contain adequate enforcement provisions. This proposed section will allow equivalent emission reductions to be achieved while providing additional flexibility to producers and importers. The proposed section also clarifies that the executive director may consider early reductions in the determination of equivalency. Additionally, the proposed section provides the executive director with some discretion to accept late plans in order to allow, for example, for new producers which come into the market after the deadline.

The proposed amendments to §114.319 will revise subsection (a) to delay the implementation date from May 1, 2002 to April 1, 2005, and to limit the coverage area to those counties listed in subsection (b). These proposed amendments will allow producers and importers additional time to complete refinery modifications to comply with the LED requirements, but will also implement the LED requirement in sufficient time to achieve the emission reductions needed to demonstrate attainment. The proposed reduction in coverage area will reduce the cost burden upon areas of the state that would not benefit as much from the use of LED as those counties that have previously been included in regional air pollution control strategies for the HGA nonattainment area. Additionally, limiting LED to the central and eastern region of Texas, rather than requiring on-road LED for the whole state, ensures that there will be sufficient clean diesel for areas of the state where it is most needed. The commission has received information from diesel fuel refiners and suppliers in Texas that a state-wide requirement would exceed the capacity of refiners to provide the clean fuel when it is required, creating the possibility that adequate LED would not be available to achieve the anticipated emission reductions.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

John Davis, Technical Specialist with Strategic Planning and Appropriations, determined that for the first five-year period the proposed amendments are in effect there will be no significant fiscal implications for units of state and local government due to the changes proposed to the commission's LED rules.

The proposed amendments to the LED rules are intended to reduce the number of affected counties from 254 to 110; delay the implementation of the LED standards from May 1, 2002 to April 1, 2005; and establish an alternative method of compliance.

The proposed amendments would decrease LED standard coverage from statewide to only the eight-county HGA ozone nonattainment area, which includes Brazoria, Chambers, Fort Bend, Galveston, Harris, Liberty, Montgomery, and Waller Counties; the four-county DFW ozone nonattainment area, which includes Collin, Dallas, Denton, and Tarrant Counties; the three-county BPA ozone nonattainment area, which includes Hardin, Jefferson, and Orange Counties; and 95 additional central and eastern Texas counties, which include Anderson, Angelina, Aransas, Atascosa, Austin, Bastrop, Bee, Bell, Bexar, Bosque, Bowie, Brazos, Burleson, Caldwell, Calhoun, Camp, Cass, Cherokee, Colorado, Comal, Cooke, Coryell, De Witt, Delta, Ellis, Falls, Fannin, Fayette, Franklin, Freestone, Goliad, Gonzales, Grayson, Gregg, Grimes, Guadalupe, Harrison, Hays, Henderson, Hill, Hood, Hopkins, Houston, Hunt, Jackson, Jasper, Johnson, Karnes, Kaufman, Lamar, Lavaca, Lee, Leon, Limestone, Live Oak, Madison, Marion, Matagorda, McLennan, Milam, Morris, Nacogdoches, Navarro, Newton, Nueces, Panola, Parker, Polk, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Sabine, San Jacinto, San Patricio, San Augustine, Shelby, Smith, Somervell, Titus, Travis, Trinity, Tyler, Upshur, Van Zandt, Victoria, Walker, Washington, Wharton, Williamson, Wilson, Wise, and Wood Counties.

In order to comply with the proposed amendments, beginning April 1, 2005, diesel fuel producers and importers must ensure diesel fuel distributed to affected areas shall not exceed 500 ppm sulfur, must

contain less than 10% by volume of aromatic hydrocarbons, and must have a cetane number of 48 or greater. The existing rules would continue to require the sulfur content in the diesel fuel supplied to the affected counties be reduced to 15 ppm sulfur beginning June 1, 2006.

The commission anticipates no additional costs beyond those previously identified, because the LED standards have not been changed from those adopted on December 6, 2000. However, the proposed amendments would result in fewer units of state and local government incurring the cost to comply with the LED standard. During the initial LED rulemaking, the commission estimated that affected state and local government units would pay \$.04 more per gallon of diesel following implementation of the LED standard (May 1, 2002) and then an additional \$.04 per gallon of diesel following implementation of the low sulfur LED standard (June 1, 2006). The price increases were estimated to cost units of state and local government \$177 per diesel vehicle for the first full years the standards were in place, for a combined compliance cost of \$354 per vehicle. The proposed amendments would delay the initial \$.04 per gallon costs until the new effective date of April 1, 2005 for LED.

PUBLIC BENEFITS AND COSTS

Mr. Davis also determined that for the first five years the proposed amendments are in effect, limiting LED to the central and eastern region of Texas, rather than requiring on-road LED for the whole state, ensures that there will be sufficient clean diesel for areas of the state where it is most needed. The commission has received information from diesel fuel refiners and suppliers in Texas that a state-wide requirement would exceed the capacity of refiners to provide the clean fuel when it is required, creating the possibility that adequate LED would not be available to achieve the anticipated emission reductions.

The proposed amendments to the LED rules are intended to reduce the number of counties affected by this rulemaking from 254 to 110; delay the implementation of the LED standard from May 1, 2002 to April 1, 2005; and establish an alternative method of compliance.

The commission anticipates no additional costs beyond those previously identified, because the LED standards have not been changed from those adopted on December 6, 2000. However, the proposed amendments would result in fewer individuals and businesses incurring the cost to comply with the LED standards. During the initial LED rulemaking, the commission estimated that affected individuals and businesses would pay \$.04 more per gallon of diesel following implementation of the LED standard (May 1, 2002) and then an additional \$.04 per gallon of diesel following implementation of the low sulfur LED standard (June 1, 2006). The price increases were estimated to cost individuals and businesses \$177 per diesel vehicle for the first full years the standards were in place, for a combined compliance cost of \$354 per vehicle. The proposed amendments would delay the initial \$.04 per gallon costs until the new effective date of April 1, 2005 for LED.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

There will be no adverse fiscal implications to small or micro-businesses as a result of administration or enforcement of the proposed amendments. There are no known diesel fuel producers or importers that would be considered small or micro-businesses. However, it is anticipated that many independent retailers of diesel fuel in the affected counties are small or micro-businesses and would be affected by the proposed amendments, which are intended to reduce the number of affected counties from 254 to

110; delay the implementation of the LED standard from May 1, 2002 to April 1, 2005; and establish an alternative method of compliance.

The commission anticipates no additional costs beyond those previously identified, because the LED standards have not been changed from those adopted on December 6, 2000. However, the proposed amendments would result in fewer small and micro-businesses incurring the cost to comply with the LED standard. During the initial LED rulemaking, the commission estimated that affected small and micro-businesses would pay \$.04 more per gallon of diesel following implementation of the LED standard (May 1, 2002) and then an additional \$.04 per gallon of diesel following implementation of the low sulfur LED standard (June 1, 2006). The price increases were estimated to cost small and micro-businesses \$177 per diesel vehicle for the first full years the standards were in place, for a combined compliance cost of \$354 per vehicle. The proposed amendments would delay the initial \$.04 per gallon costs until the new effective date of April 1, 2005 for LED.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225, and determined that the proposed rulemaking is not subject to §2001.0225 because it does not meet the definition of a “major environmental rule” as defined in that statute. “Major environmental rule” means a rule, the specific intent of which, is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The amendments to Chapter 114 are intended to protect the environment or reduce risks to human health from

environmental exposure to ozone but will not affect in a material way, a sector of the economy, competition, and the environment due to its impact on the fuel manufacturing and distribution network of the state. The amendments are intended to provide flexibility in the LED air pollution control program as part of the strategy to reduce emissions of NO_x necessary for the counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS.

Additionally, §2001.0225 only applies to a major environmental rule, the result of which is to: 1.) exceed a standard set by federal law, unless the rule is specifically required by state law; 2.) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3.) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4.) adopt a rule solely under the general powers of the agency instead of under a specific state law.

This proposed rulemaking action does not meet any of these four applicability requirements.

Specifically, the LED fuel requirements including these proposed rules were developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409, and therefore meet a federal requirement.

Provisions of 42 USC, §7410, require states to adopt a SIP which provides for “implementation, maintenance, and enforcement” of the primary NAAQS in each air quality control region of the state.

While §7410 does not require specific programs, methods, or reductions in order to meet the standard, SIPs must include “enforceable emission limitations and other control measures, means or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance as may be necessary or appropriate to meet the applicable requirements of this chapter,” (meaning Chapter 85, Air Pollution Prevention and Control).

It is true that 42 USC does require some specific measures for SIP purposes, like the inspection and maintenance program, but those programs are the exception, not the rule, in the SIP structure of 42 USC. The provisions of 42 USC recognize that states are in the best position to determine what programs and controls are necessary or appropriate in order to meet the NAAQS. This flexibility allows states, affected industry, and the public, to collaborate on the best methods for attaining the NAAQS for the specific regions in the state. Even though 42 USC allows states to develop their own programs, this flexibility does not relieve a state from developing a program that meets the requirements of §7410. Thus, while specific measures are not generally required, the emission reductions are required. States are not free to ignore the requirements of §7410 and must develop programs to assure that the nonattainment areas of the state will be brought into attainment on schedule.

The requirement to provide a fiscal analysis of proposed regulations in the Texas Government Code was amended by Senate Bill (SB) 633 during the 75th Legislative Session, 1997. The intent of SB 633 was to require agencies to conduct a regulatory impact analysis (RIA) of extraordinary rules. These are identified in the statutory language as major environmental rules that will have a material adverse impact and will exceed a requirement of state law, federal law, or a delegated federal program, or are adopted solely under the general powers of the agency. With the understanding that this requirement would seldom apply, the commission provided a cost estimate for SB 633 that concluded “based on an assessment of rules adopted by the agency in the past, it is not anticipated that the bill will have significant fiscal implications for the agency due to its limited application.” The commission also noted that the number of rules that would require assessment under the provisions of the bill was not large. This conclusion was based, in part, on the criteria set forth in the bill that exempted proposed rules

from the full analysis unless the rule was a major environmental rule that exceeds a federal law. As previously discussed, 42 USC does not require specific programs, methods, or reductions in order to meet the NAAQS; thus, states must develop programs for each nonattainment area to ensure that area will meet the attainment deadlines. Because of the ongoing need to address nonattainment issues, the commission routinely proposes and adopts SIP rules. The legislature is presumed to understand this federal scheme. If each rule proposed for inclusion in the SIP was considered to be a major environmental rule that exceeds federal law, then every SIP rule would require the full RIA contemplated by SB 633. This conclusion is inconsistent with the conclusions reached by the commission in its cost estimate and by the Legislative Budget Board (LBB) in its fiscal notes. Since the legislature is presumed to understand the fiscal impacts of the bills it passes, and that presumption is based on information provided by state agencies and the LBB, the commission believes that the intent of SB 633 was only to require the full RIA for rules that are extraordinary in nature. While the SIP rules will have a broad impact, that impact is no greater than is necessary or appropriate to meet the requirements of the FCAA. For these reasons, rules proposed for inclusion in the SIP fall under the exception in Texas Government Code, §2001.0225(a), because they are required by federal law. The commission performed photochemical grid modeling which predicts that NO_x emission reductions, such as those required by these rules, will result in reductions in ozone formation in the HGA ozone nonattainment area. This rulemaking does not exceed an express requirement of state law. This rulemaking is intended to obtain NO_x emission reductions which will result in reductions in ozone formation in the HGA ozone nonattainment area and help bring HGA into compliance with the air quality standards established under federal law as NAAQS for ozone. The rulemaking does not exceed a standard set by federal law, exceed an express requirement of state law (unless specifically required

by federal law), or exceed a requirement of a delegation agreement. The rulemaking was not developed solely under the general powers of the agency, but was specifically developed to meet the NAAQS established under federal law and authorized under Texas Clean Air Act (TCAA), §§382.011, 382.012, 382.017, 382.019, 382.037(g), and 382.039.

The commission invites public comment on the draft RIA determination.

TAKINGS IMPACT ASSESSMENT

The commission prepared a takings impact assessment for these proposed rules in accordance with Texas Government Code, §2007.043. The following is a summary of that assessment. The specific purpose of the proposed rulemaking is to provide flexibility in the LED fuel program which will act as an air pollution control strategy to reduce NO_x emissions necessary for the eight counties included in the HGA ozone nonattainment area to be able to demonstrate attainment with the ozone NAAQS.

Promulgation and enforcement of the proposed rules will not burden private, real property because this proposed rulemaking action does not require an investment in the permanent installation of new refinery processing equipment. Although the proposed rules do not directly prevent a nuisance or prevent an immediate threat to life or property, the LED program does prevent a real and substantial threat to public health and safety, and partially fulfill a federal mandate under 42 USC, §7410. Specifically, the emission limitations and control requirements within the LED program have been developed in order to meet the ozone NAAQS set by the EPA under 42 USC, §7409. States are primarily responsible for ensuring attainment and maintenance of the NAAQS once the EPA has established them. Under §7410 and related provisions, states must submit, for approval by the EPA, SIPs that provide for the

attainment and maintenance of NAAQS through control programs directed to sources of the pollutants involved. Therefore, the purpose of the proposed rules is to provide flexibility in implementing cleaner burning diesel fuel which is necessary for the HGA ozone nonattainment area to meet the air quality standards established under federal law as NAAQS. Consequently, the exemption which applies to these proposed rules is that of an action reasonably taken to fulfill an obligation mandated by federal law; therefore, these proposed rules do not constitute a takings under the Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission determined that the rulemaking action relates to an action or actions subject to the Texas Coastal Management Program (CMP) in accordance with the Coastal Coordination Act of 1991, as amended (Texas Natural Resources Code, §§33.201 et seq.), and the commission rules in 30 TAC Chapter 281, Subchapter B, concerning Consistency with the CMP. As required by 30 TAC §281.45(a)(3) and 31 TAC §505.11(b)(2), relating to actions and rules subject to the CMP, commission rules governing air pollutant emissions must be consistent with the applicable goals and policies of the CMP. The commission reviewed this action for consistency with the CMP goals and policies in accordance with the rules of the Coastal Coordination Council, and determined that the action is consistent with the applicable CMP goals and policies. The CMP goal applicable to this rulemaking action is the goal to protect, preserve, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (31 TAC §501.12(1)). No new sources of air contaminants will be authorized and NO_x air emissions will be reduced as a result of these rules. The CMP policy applicable to this rulemaking action is the policy that commission rules comply with regulations in 40

CFR, to protect and enhance air quality in the coastal area (31 TAC §501.14(q)). This rulemaking action complies with 40 CFR Part 51. Therefore, in compliance with 31 TAC §505.22(e), the commission affirms that this rulemaking action is consistent with CMP goals and policies. Interested persons may submit comments on the consistency of the proposed rules with the CMP during the public comment period.

ANNOUNCEMENT OF HEARINGS

The commission will hold a public hearing on this proposal on July 2, 2001 at 6:00 p.m., Houston City Hall Council Chambers, 2nd Floor, 901 Bagby, Houston. The hearing is structured for the receipt of oral or written comments by interested persons. Registration will begin one hour prior to the hearing. Individuals may present oral statements when called upon in order of registration. A four-minute time limit will be established at the hearing to assure that enough time is allowed for every interested person to speak. Open discussion will not occur during the hearing; however, agency staff members will be available to discuss the proposal one hour before the hearing, and will answer questions before and after the hearing. Earlier public hearings on this proposal were scheduled at the following times and locations: June 13, 2001, 6:00 p.m., Galveston City Council Chambers, Room 200, 823 Rosenberg, Galveston; June 14, 2001, 10:00 a.m., Rosenberg Civic and Convention Center, Room C, 3825 Highway 36 South, Rosenberg; June 14, 2001, 6:00 p.m., Houston City Hall Council Chambers, 2nd Floor, 901 Bagby, Houston; and June 15, 2001, 10:00 a.m., Texas Natural Resource Conservation Commission, Building E, Room 201S, 12100 North I-35, Austin. The notices for the June 13 - 15 hearings were published in the Fort Worth Star-Telegram, Houston Chronicle, Longview News-Journal, and the San Antonio Express-News on May 11, 2001 and in the Austin American Statesman and Beaumont Enterprise on May 12, 2001. A public hearings notice was also published in the June 8, 2001 issue of the *Texas Register*.

Persons with disabilities who have special communication or other accommodation needs, who are planning to attend the hearing, should contact the Office of Environmental Policy, Analysis, and Assessment at (512) 239-4900. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Ms. Heather Evans, Office of Environmental Policy, Analysis, and Assessment, MC 206, P.O. Box 13087, Austin, Texas 78711-3087, faxed to (512) 239-4808, or emailed to *siprules@tnrcc.state.tx.us*. All comments should reference Rule Log Number 2001-007d-114-AI. Comments must be received by 5:00 p.m., July 2, 2001, although written comments submitted at the July 2, 2001 hearing will be accepted. On May 10, 2001, the commission proposed changes to Chapters 114, 117, and to the SIP which were made available on the commission's web site and which were the subject of newspaper notices as listed above. Subsequently, on May 30, 2001 the commission proposed changes to Chapters 101, 117 and the SIP. The latest versions of all of the proposed rules in Chapters 101, 114 and 117 and the SIP revision were placed on the commission's web site on May 30, 2001 and are available at <http://www.tnrcc.state.tx.us/opr/sips/houston.html>. For further information, please contact Morris Brown at (512) 239-1438 or Alan Henderson at (512) 239-1510.

STATUTORY AUTHORITY

The amendments and new section are proposed under Texas Water Code (TWC), §5.103, which authorizes the commission to adopt rules necessary to carry out its powers and duties under the TWC; and under the Texas Health and Safety Code, TCAA, §382.017, concerning Rules, which authorizes the commission to adopt rules consistent with the policy and purposes of the TCAA. The amendments are also proposed under TCAA, §382.011, concerning General Powers and Duties, which authorizes the commission to control the quality of the state's air; §382.012, concerning State Air Control Plan, which authorizes the commission to prepare and develop a general, comprehensive plan for the control of the state's air; §382.019, concerning Methods Used to Control and Reduce Emissions from Land

Vehicles, which authorizes the commission to adopt rules to control and reduce emissions from engines used to propel land vehicles; §382.037(g), concerning Vehicle Emissions Inspection and Maintenance Program, which authorizes the commission to regulate fuel content if it is demonstrated to be necessary for attainment of the NAAQS; and §382.039, concerning Attainment Program, which authorizes the commission to develop and implement transportation programs and other measures necessary to demonstrate attainment and protect the public from exposure to hazardous air contaminants from motor vehicles.

The proposed amendments and new section implement TCAA, §§382.002, 382.011, 382.012, 382.019, 382.037(g), and 382.039.

SUBCHAPTER H: LOW EMISSION FUELS

DIVISION 2: LOW EMISSION DIESEL

§§114.314, 114.318, 114.319

§114.314. Registration of Diesel Producers and Importers.

Each producer and importer that sells, offers for sale, supplies, or offers for supply from its production facility or import facility low emission diesel fuel (LED) which may ultimately be used in counties listed in §114.319 of this title (relating to Affected Counties and Compliance Dates) shall register with the executive director by December 1, 2004 [2001]; or after April 30, 2005 [May 31, 2002], within 30 days after the first date that such person will produce or import LED. Registration shall be on forms prescribed by the executive director and shall include a statement of acceptance of the standards and enforcement provisions of this division; and shall include a statement of consent by the registrant that the executive director shall be permitted to collect samples and access documentation and records. The executive director shall maintain a listing of all registered suppliers.

§114.318. Alternative Emission Reduction Plan.

Diesel fuel which is sold, offered for sale, supplied, or offered for supply by a producer who submits by January 2003 an alternative emission reduction plan, which contains a substitute fuel strategy and which is approved by the executive director and the EPA no later than May 2003, will be considered in compliance with the requirements of this division. In order to be approved, the plan must

demonstrate the market share the producer supplies, demonstrate the reductions associated with compliance with this division attributable to the market share, specify a substitute fuel strategy that will achieve equivalent reductions, and contain adequate enforcement provisions. Early reductions may be deemed to be equivalent by the executive director and the EPA. The executive director may allow plans to be submitted after January 2003; however any plan must be approved prior to the use of that plan for compliance with the requirements of this division.

§114.319. Affected Counties and Compliance Dates.

(a) Beginning April [May] 1, 2005 [2002], affected persons in the counties listed in subsection (b) of this section [all counties of Texas] shall be in compliance, as applicable, with §§114.312 - 114.317 of this title (relating to Low Emission Diesel Standards; Designated Alternate Limits; Registration of Diesel Producers and Importers; Approved Test Methods; Monitoring, Recordkeeping, and Reporting Requirements; and Exemptions to Low Emission Diesel Requirements) for that diesel fuel which may ultimately be used to power a diesel fueled compression-ignition engine in a motor vehicle.

(b) Beginning April [May] 1, 2005 [2002], affected persons in the following counties shall be in compliance with §§114.312 - 114.317 of this title for that diesel fuel which may ultimately be used to power a diesel fueled compression-ignition engine in a motor vehicle or in non-road equipment:

(1) - (4) (No Change.)

(c) (No Change.)

